

Exhibit No. 13

Case No. 22-cv-00384-JSR

Declaration of Rhett O. Millsaps II In Support Of Rothschild's
Opposition To Plaintiffs' Motion For Summary Judgment

September 20, 2022

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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HERMES INTERNATIONAL AND HERMES OF
PARIS, INC.

Plaintiff, :

- against -

MASON ROTHSCHILD,

Defendant. :

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September 20, 2022
11:05 a.m.

** CONFIDENTIAL **

VIDEOTAPED EXAMINATION BEFORE TRIAL of
DR. BRUCE ISAACSON, an Expert Witness on
behalf of the Plaintiffs herein, taken by the
Defendant, pursuant to Court Order, held at
the above-mentioned time via videoconference
by all parties, before Michelle Lemberger, a
Notary Public of the State of New York.

September 20, 2022

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ALSO PRESENT:

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2 company Hermes. That was their answer. It's
3 very clear who they think makes or provides
4 the items shown on the web page.

5 So if someone had answered that in a
6 way that made it clear that they thought that
7 Hermes was shown on the web page or Birkin
8 was shown on the web page, that's the
9 confusion answer.

10 There's -- Dr. Neal, in his rebuttal
11 report, seems to indicate that there are two
12 different kinds of confusion in this case.
13 And there's only one kind of confusion that
14 I'm basing my opinions on. And that's where
15 someone sees the MetaBirkins web page and
16 makes a cognitive connection in their own
17 mind between that web page and Hermes or
18 Birkin. That's what my survey measures.

19 Q. What is the item that's shown on the
20 web page?

21 A. The web page shows a number of
22 items, but most of those items are variants
23 of Hermes bags. There's also some text on
24 the web page, there's a bunch of other things
25 on the web page, but most of what's on that

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2 web page are variants of Hermes bags or
3 counterfeits of Hermes bags or some kind of
4 mutation of an Hermes bag.

5 Q. This was your survey for NFT
6 purchasers, am I right?

7 A. The database that we're looking at
8 right now, which is Exhibit 2, is the survey
9 for NFT purchasers.

10 Q. Right. So were you not measuring
11 here confusion about the source of the NFTs?

12 A. I'm measuring confusion about the
13 MetaBirkins home page. Again, you've used
14 the phrase NFTs, and I'm not sure if you're
15 referring to a particular place on the --
16 entry on the block chain or the artwork that
17 is included with the NFT. But I'm measuring
18 confusion with respect to the MetaBirkins web
19 page.

20 Q. Didn't you use the term NFT to
21 define your universe for the survey?

22 A. I defined the survey universe, in
23 part, as someone who would be likely to
24 purchase an NFT.

25 Q. And what was the other part of the

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2 marks were present in the test and removed in
3 the control?

4 A. Yes. Broadly defined, I would agree
5 with that statement. There are elements of
6 the trade dress that were removed as part of
7 that, but, yes.

8 Q. So in regard to that 18.7 percent
9 net confusion level that you found, what
10 share of that is caused just by respondents'
11 reactions to the word marked Hermes in the
12 stimulus?

13 A. I haven't provided an opinion on
14 that.

15 Q. So sitting here today, what would
16 your answer be?

17 A. My answer would be that I haven't
18 provided an opinion on that.

19 Q. Why haven't you provided an opinion
20 on that?

21 A. Because Hermes asserts rights to all
22 of those items that you just mentioned, to
23 the Hermes name, the Birkin name and the
24 Birkin trade dress, including the elements
25 that are associated with that Birkin trade

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2 dress.

3 They assert rights to all of those,
4 and they're objecting to Mason Rothschild's
5 use of all of those as a group. And so I
6 measured them as a group, I didn't measure
7 them individually.

8 So I don't have an opinion about any
9 of the individual elements. I only have an
10 opinion about the elements as a group,
11 because they're asserted as a group.

12 Q. And you didn't test confusion
13 attributable to any of those three things
14 separately, right?

15 A. Correct.

16 Q. Is it possible to know from your
17 data what share of the 18.7 percent is caused
18 just by respondents' reactions to the word
19 mark Hermes?

20 A. No.

21 Q. And is it possible from your data to
22 determine what percentage of the 18.7 percent
23 is caused just by respondents' reactions to
24 the word mark Birkin?

25 A. No.

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2 Q. Is it possible from your data to
3 determine what part of that 18.7 percent is
4 caused just by respondents' reactions to the
5 claimed Birkin trade dress?

6 A. No.

7 Q. So is it possible that all of the
8 net confusion that you say is present here is
9 being caused by the claimed Birkin trade
10 dress alone?

11 A. Like I said, I don't have an opinion
12 on the confusion caused by individual
13 elements. I only have an opinion on the
14 confusion caused by the group.

15 Q. So then, again, is it possible then
16 that all of the net confusion that you say is
17 present is caused by the claimed Birkin trade
18 dress?

19 A. I don't think that's consistent with
20 the answers that are provided in the survey
21 or the way that consumer behavior works,
22 given what Hermes has alleged and described
23 in this case. So I don't think that's at all
24 likely what you're describing, given the
25 survey data and given the case facts, as we